IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No.43 of 1995

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
NITIN AND COMPANY - Respondent(s)

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Appearance :
MRS MM BHATT for Applicant(s) : 1,
NOTICE UNSERVED for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 06/12/2005
ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. The Income-tax Appellate Tribunal, Ahmedabad Bench 'A' has referred the following question

under Section 256(1) of the Income-tax Act, 1961 (the Act) at the instance of the Commissioner of Income-tax:

> "Whether, the Appellate Tribunal is right in law and on facts in holding that the discount allowed to the wholesale dealers from the listed detailed price and commission paid to the selling agent did not come within the purview of section 37(3A) in as much as trade discount merely represents lesser realisation of the sale price itself and the commission paid to the selling agents are actual selling expenses."

2. Heard Mrs.M.M.Bhatt, learned Standing Counsel for the applicant-revenue. The Board shows endorsement "Notice Unserved" qua the respondent. However, in light of the view that the Court is inclined to take, it is not necessary to await service.

3. It is necessary to re-frame the question in light of fact that the controversy between the parties was restricted only in relation to commission paid to selling agents and there was no dispute as regards any trade discount. Hence, the question is re-framed to read as under:

> "Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in law in holding that commission paid to the selling agents did not come within the purview of Section 37(3A) of the Income-tax Act, 1961 as the commission paid is actual selling expenses ?"

4. Mrs.M.M.Bhatt, learned Standing Counsel for the applicant-revenue, has very fairly invited attention to judgment rendered by this Court in the case of Commissioner of Income-tax Vs. Jagfashion Textile Mills Pvt. Ltd., rendered on 1st December, 2005 in Income Tax Reference No.23 of 1995 wherein identical issue was decided by this Court following earlier judgment dated 24th November, 2005 in Income Tax Reference No.300 of 1994 as well as judgment rendered in the case of Commissioner of Income-tax Vs. Zippers India, Income Tax Reference No.141 of 1994 rendered on 5th October, 2005.

5. In the circumstances, applying the ratio of the aforesaid decisions rendered by this Court it cannot be stated that commission paid to selling agents would come within the phrase 'sales promotion' so as to be hit by Section 37(3A) of the Act and the Tribunal was justified in holding so.

6. The re-framed question is, accordingly, answered in the affirmative i.e. in favour of the assessee and against the Revenue. The reference stands disposed of accordingly. There shall be no order as to costs.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

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*Bhavesh**